No. 17-395

IN THE

Supreme Court of the United States

TAYLOR FARMS PACIFIC, INC., d/b/a TAYLOR FARMS,
Petitioner,

v.

MARIA DEL CARMEN PENA, CONSUELO HERNANDEZ, LETICIA SUAREZ, ROSEMARY DAIL, WENDELL T. MORRIS, on behalf of themselves and on behalf of all other similarly situated individuals,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

To the Honorable Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and 37.2 of the Rules of this Court, the Center for Workplace Compliance (CWC) hereby respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the Petitioner in this case. The written consent of

counsel for the Petitioner has been filed with the Clerk of the Court. The consent of counsel for the Respondents was requested but not acted upon.

In support of its motion, CWC submits the following:

1. Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

2. For instance, all of CWC's member companies are employers subject to the federal employment nondiscrimination statutes enforced by the U.S. Equal Employment Opportunity Commission (EEOC), including Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*; the Equal Pay Act (EPA), 29 U.S.C. § 206(d); and the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff *et seq.* They are also covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.,* and the Family and Medical Leave Act (FMLA), 29 U.S.C.

§§ 2601 *et seq.*, both of which are enforced by the U.S. Department of Labor's Wage and Hour Division. Many CWC members also are federal government contractors subject to the affirmative action requirements of Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended, and the implementing regulations under 41 C.F.R. ch. 60, Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. §§ 4211 *et seq.* Those requirements are enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs.

3. Accordingly, as potential defendants to large-scale class action litigation, the issue presented in this case is extremely important to the nationwide constituency that CWC represents. The Ninth Circuit ruled incorrectly that evidence offered in support of class certification need not be admissible under the Federal Rules of Evidence. Petitioner contends, correctly, that a class action cannot be certified based on information that does not meet the admissibility standards set forth in the Federal Rules of Evidence and of Civil Procedure. This Court's resolution of whether evidence presented in support of class certification under Rule 23 of the Federal Rules of Civil Procedure must be admissible will have substantial legal and practical impacts on all businesses nationwide.

4. CWC has participated in numerous cases addressing the proper interpretation and application of Rule 23. *See, e.g.*, *Comcast Corp. v. Behrend,* 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982). Because of its experience in these matters, CWC is especially well-situated to

brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

WHEREFORE, for the reasons stated, the Center for Workplace Compliance respectfully requests the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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Respondents.

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BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

The Center for Workplace Compliance (CWC) respectfully submits this brief *amicus curiae*. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice of the *amicus curiae's* intention to file this brief at least 10 days prior to the due date. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

For instance, all of CWC's member companies are employers subject to the federal employment nondiscrimination statutes enforced by the U.S. Equal Employment Opportunity Commission (EEOC), including Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*; the Equal Pay Act (EPA), 29 U.S.C. § 206(d); and the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff *et seq.* They are also covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C.

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person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

§§ 2601 *et seq.*, both of which are enforced by the U.S. Department of Labor's Wage and Hour Division. Many CWC members also are federal government contractors subject to the affirmative action requirements of Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended, and the implementing regulations under 41 C.F.R. ch. 60, Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. §§ 4211 *et seq.* Those requirements are enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs.

Accordingly, as potential defendants to large-scale class action litigation, the issue presented in this case is extremely important to the nationwide constituency that CWC represents. The Ninth Circuit ruled incorrectly that evidence offered in support of class certification need not be admissible under the Federal Rules of Evidence. Petitioner contends, correctly, that a class action cannot be certified based on information that does not meet the admissibility standards set forth in the Federal Rules of Evidence and of Civil Procedure. This Court's resolution of whether evidence presented in support of class certification under Rule 23 of the Federal Rules of Civil Procedure must be admissible will have substantial legal and practical impacts on all businesses nationwide.

CWC has participated in numerous cases addressing the proper interpretation and application of Rule 23. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982). Because of its experience in these matters, CWC is especially well-situated to brief this

Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondents Maria Del Carmen Pena, Consuelo Hernandez, Leticia Suarez, Rosemary Dail and Wendell T. Morris worked for Petitioner Taylor Farms Pacific, Inc. (TFP) at its two food production and processing plants in Tracy, California. Pet. App. 4a-5a. As is relevant here, Respondents claim that Petitioner did not provide them meal periods and rest breaks in accordance with the requirements of California Labor Code §§ 226.7 and 512 and California Code of Regulations title 8, § 11080. Pet. App. 5a-6a. They also claim that because of these alleged meal period and rest break violations, their final paychecks did not include all wages owed, entitling them to waiting time penalties under California Labor Code §§ 201-03. *Id.*

Seeking to represent a class of Petitioner's current and former employees, Respondents moved for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 5a. In support of their motion for class certification, Respondents filed several documents, including a 9,000 page Microsoft Excel spreadsheet, created by their lawyers, which analyzed and manipulated the raw timekeeping data produced by TFP (Exhibit 17). *Id.* at 27a-28a. Offered to prove commonality, predominance, and superiority, Exhibit 17 contained what Respondents' counsel represented to be the total number of meal period violations for the putative class. *Id*. at 10a, 26a-28a. Respondents did not submit the raw timekeeping data underlying Exhibit 17 or provide the methodology that they used to create the spreadsheet. *Id*.

Petitioner opposed class certification, objecting to the admissibility of Exhibit 17 on a number of grounds, including that it was created by lawyers with no personal knowledge of the putative class members' actual meal period experiences, and who are not expert witnesses subject to cross-examination and the standards of admissibility established by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pet. App. 10a-11a.

On February 10, 2015, the district court certified two Rule 23(b)(3) subclasses for meal period and wage violations.[2] *Id*. at 59a-60a. The district court refused to consider Petitioner's evidentiary objections, finding that "evidence presented in support of class certification need not be admissible at trial." *Id*. at 10a. It thus rejected Petitioner's contention that Exhibit 17 was inadmissible, *id*., and relied on it exclusively in finding that Respondents met the predominance and superiority requirements of Rule 23. *Id*. at 48a-53a.

Petitioner appealed the grant of class certification under Fed. R. Civ. P. 23(f). *Id*. at 3a. In an unpublished opinion that provided no independent analysis, the Ninth Circuit affirmed the district court's certification of the two subclasses. *Id*. Following denial by the Ninth Circuit of its petition for rehearing *en banc*, Petitioner filed a petition for writ of certiorari on September 14, 2017.

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[2] The court denied class certification as to three other requested subclasses. Pet. App. 59a-60a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below cannot be reconciled with this Court's repeated command that trial courts conduct a "rigorous analysis" of all evidence offered in support of (and against) class certification so as to ensure that every element required by Rule 23 of the Federal Rules of Civil Procedure has been established by a preponderance of the evidence. Because it evinces, at best, a fundamental misunderstanding of the proper role of district courts in evaluating motions for class certification and, at worst, a blatant disregard for this Court's Rule 23 jurisprudence, and also deepens an already well-defined conflict in the courts on this issue, review and reversal of the decision below is warranted.

The Ninth Circuit's decision below effectively rejects the rigorous analysis standard for district court review of class certification motions established by this Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), and reaffirmed in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), by allowing plaintiffs to rely on an unverified Microsoft Excel spreadsheet prepared by counsel that analyzed Petitioner's time record data, in order to satisfy the threshold requirements of Rule 23(a) and Rule 23(b)(3). Such a rule, if permitted to stand, would allow class certification of virtually any well-pled complaint, thus undermining the purposes of the class action tool and profoundly disadvantaging the companies having to defend such actions.

In both *Wal-Mart Stores, Inc. v Dukes* and *Comcast Corp. v. Behrend*, this Court made clear that a court may need "to probe behind the pleadings before

coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v Dukes*, 564 U.S. 338, 350-51 (2011) (citation and internal quotations omitted)). In conducting such a rigorous analysis, this Court has endorsed an examination into the underlying merits. *Id*. at 33-34 ("[s]uch an analysis will frequently entail 'overlap with the merits of the plaintiff's underlying claim'") (quoting *Dukes*, 564 U.S. at 351). This is necessary because the class determination requires a court to consider factual and legal issues that may also be central to resolution of the merits. *Id. See also Funeral Consumers Alliance Inc. v. Service Corp. Intern.*, 695 F.3d 330, 346 (5th Cir. 2012); *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005).

Thus under both *Comcast* and *Dukes*, plaintiffs must establish every Rule 23 element by preponderance of the evidence, and the district court must resolve any evidentiary challenges prior to certifying a class. *Comcast*, 569 U.S. at 33; *Dukes*, 564 U.S. at 351-52. *Dukes* also strongly suggests that whenever a request for class certification rests upon controverted evidence, the district court must assess the admissibility of that evidence prior to certifying the class.

In refusing to entertain Petitioner's evidentiary objections, the courts below disregarded this Court's command that district courts engage in a rigorous analysis when deciding whether to certify a class action under Rule 23. Instead, the district court, relying on a district court case decided *before Comcast*, held that "evidence presented in support of class certification need not be admissible at trial." Pet. App.

at 10a-11a (citations and internal quotations omitted). Because accepting documents that are inadmissible under the Federal Rules of Evidence falls well short of the "significant" and "evidentiary" proof standards required by *Falcon*, *Dukes* and *Comcast*, it is plainly inadequate as a matter of law to support Rule 23 class certification.

Persistent questions in the courts regarding the proper analysis of Rule 23 at the class certification stage have created significant confusion and uncertainty for parties to class litigation. Differing analyses at the class certification stage also lead to forum shopping and other strategies designed to gain a litigation advantage regardless of the quality of the evidence supporting Rule 23 certification. The same evidence may be enough to support class certification in one jurisdiction, but not in several others. Courts must be able to understand, and faithfully and uniformly apply, the rules in a manner that ensures consistency and fairness for all parties.

The stakes associated with class certification determinations are too high to allow for such uncertainty. Once a class is certified, significant pressure invariably comes to bear on the defendant to settle even questionable class claims. If a defendant chooses to vigorously defend itself on the merits, knowing that the plaintiffs do not have admissible evidence to support their claims, the costs associated with such a defense can be astronomical. These costs, along with the burden imposed on the judiciary of adjudicating a baseless claim, would be mitigated significantly if plaintiffs were required to submit only admissible evidence in support of class certification. A district court's commitment to fully evaluating all evidence going to the propriety of class certification, including

the admissibility of such evidence, is especially important in wage and hour cases in which manipulated data, such as that at issue here, is regularly offered as proof that Rule 23's requirements have been met.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NEEDED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. The Evidentiary Standard Endorsed By The Court Below Cannot Be Reconciled With The Language Of Rule 23 And This Court's Decisions Requiring A "Rigorous Analysis" Of The Evidence

The decision below, which embraces an erroneous standard for evaluating the propriety of evidence presented in support of class certification under Rule 23 of the Federal Rules of Civil Procedure, establishes such a low threshold that it is difficult to imagine a circumstance under which its application would not result in class certification. It departs from decisions of several other courts of appeals and is inconsistent with this Court's admonition that district courts perform a "rigorous analysis" as to whether plaintiffs' evidence supports Rule 23 class certification, thereby making it especially appropriate for review by this Court.

To maintain a class action in federal court, plaintiffs generally must satisfy all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23. Rule 23(a) permits class certification only when:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Plaintiffs must also satisfy one of the provisions of Rule 23(b). Rule 23(b)(2) allows certification only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) permits certification where "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To satisfy the requirements of Rule 23(b)(3), class plaintiffs need to demonstrate that they can prove damages on a classwide basis.

The legal landscape of class certification proceedings has changed considerably in the past two decades, with courts giving greater scrutiny to plaintiffs' claims prior to granting class certification. This Court prompted that change in *General Telephone Co. of Southwest v. Falcon*, by declaring that district courts must conduct a rigorous analysis when evaluating Rule 23 motions for class certification, even if such analysis will require an examination into the underlying merits. 457 U.S. 147, 160-61 (1982). In doing so, it sometimes "may be necessary for the court to probe behind the pleadings before coming to rest on the

certification question." *Id*. at 160. By so holding, this Court in *Falcon* clarified that its earlier statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits," *id.* at 177, should not be read to prohibit merit-based inquiries at the class certification stage when necessary.

Almost thirty years after *Falcon*, this Court reaffirmed and clarified the now well-established rigorous analysis principle in *Wal-Mart Stores, Inc. v. Dukes*, and *Comcast Corp. v. Behrend*. In *Dukes*, it also further sought to dispel the misperception among some lower courts that *Eisen* prohibits merit-based inquires in assessing Rule 23 motions for class certification. *Dukes*, 564 U.S. at 351 n.6. Nevertheless, some courts, including the court below, continue to resist that sensible notion, choosing instead to perpetuate an unfounded yet persistent misunderstanding of the analysis required for class certification.

The rigorous analysis standard is also supported by the 2003 amendments to Rule 23. Rule 23(c)(1)(A) was amended to change the timing of class certification to encourage discovery at the certification stage and avoid premature certification decisions. Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment; *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318-19 (3d Cir. 2008). The amendments also eliminated the initial conditional certification process. Now, a court must be more thoughtful when deciding whether to grant class certification because it only has one opportunity. To "get it right", it must rely on only admissible evidence.

Given this backdrop, and the general judicial trend towards increasingly specific standards and requirements that courts should use to evaluate class certification, the "no rules of evidence" approach endorsed by the courts below cannot be justified. Accordingly, review of the decision below is warranted.

B. The Decision Below Magnifies The Conflict In The Courts Regarding Whether Evidence Used To Establish Class Certification Under Rule 23 Must Be Admissible

1. The Second, Third, Fifth, Seventh, and D.C. Circuits have required that plaintiffs put forward only admissible evidence

This Court made clear in *Comcast* that plaintiffs must present "evidentiary proof" to establish Rule 23(b)'s requirements for class certification. 569 U.S. at 33. Even before *Dukes* and *Comcast*, most courts took the position that a class could not be certified based on inadmissible evidence alone or mere reliance on the pleadings, particularly to demonstrate commonality of damages. Most circuit courts presented with this issue have refused to permit certification of a class action where plaintiffs cannot prove every Rule 23 element by a preponderance of the evidence.

The Second Circuit, in *Teamsters Local 455 Freight Division Pension Fund v. Bombardier, Inc.*, explained that the "preponderance of evidence" standard requires a district court:

> "to assess all of the relevant evidence admitted at the class certification stage," to "resolve[] factual disputes relevant to each Rule 23 requirement," and "[to] find[] that whatever underlying facts are

> relevant to a particular Rule 23 requirement have been established," notwithstanding an issue's overlap with the merits. Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.

546 F.3d 196, 202 (2d Cir. 2008) (citation omitted). *See also Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010).

In *In re Blood Reagents Antitrust Litigation*, the Third Circuit remanded the lower court's class certification order because it found that the court relied on evidence that "'could evolve to become admissible evidence' at trial." 783 F.3d 183, 186 (3d Cir. 2015) (citation omitted). According to the Third Circuit, this was not the proper standard, concluding that the plaintiff was required to proffer evidentiary proof for each required element of Rule 23 and could not rely on materials that may become admissible in the future.

Relying on *Comcast*, the D.C. Circuit has held that district courts are required to scrutinize the validity of the evidence before granting class certification. *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 253, 255 (D.C. Cir. 2013). Similarly, the Seventh Circuit has held that when an expert's report is "critical to class certification," the court must rule on its admissibility before ruling on the class certification motion. *Messner v. Northshore University Healthsystem*, 669 F.3d 802, 811-12 (7th Cir. 2014). Finally, the Fifth Circuit has also required that plaintiffs present admissible evidence to support a class certification motion under Rule 23. *See e.g., Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009) (requiring securities plaintiffs to establish loss causation by preponderance of all

admissible evidence); *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) ("a careful certification inquiry is required and findings must be made based on adequate admissible evidence to justify class certification").

2. The Eighth and Ninth Circuits have certified class actions based on inadmissible evidence

Although the majority of circuits to weigh in on this issue have required admissible evidence to support class certification, the Eighth Circuit – now joined by the court below – does not require that plaintiffs proffer admissible evidence to support a motion for class certification. In *In re Zurn Pex Plumbing Products Liability Litigation*, the Eighth Circuit held that admissible evidence is not required at the class certification stage because class certification decisions take place before the close of discovery when there is "bound to be some evidentiary uncertainty." 644 F.3d 604, 613 (8th Cir. 2011). In analyzing the reliability of the expert testimony, the Eighth Circuit also refused to apply the *Daubert* test, opting instead to use its own admissibility standard. *Id.* at 613-14.

Most recently, the Western District of Missouri refused to deny class certification even though the plaintiffs failed to submit any admissible evidence. *Postawko v. Missouri Department of Corrections*, No. 2:16-cv-04219-NKL, 2017 WL 3185155 (W.D. Mo. July 26, 2017), *appeal filed*, (8th Cir. Sept. 19, 2017). It found that "there is no rule that requires admissible evidence be submitted to support a class certification motion." *Postawko*, 2017 WL 3185155, at *4. Such a conclusion is directly at odds with the principles articulated by this Court in *Dukes* and *Comcast*, as well as the Federal Rules of Evidence, and further

demonstrates the need for this Court to articulate the correct evidentiary standard for class certification.

II. ALLOWING A CLASS ACTION TO BE CERTIFIED BASED ON INADMISSIBLE EVIDENCE SIGNIFICANTLY DISADVANTAGES EMPLOYERS AND BURDENS THE JUDICIARY

Review of the decision below is essential to ensure that trial courts only certify claims that are supported by admissible evidence. Demanding greater scrutiny of evidence at the class certification stage is necessary to ensure fundamental fairness to plaintiffs, defendants, and absent class members, as well as to protect employers from frivolous and baseless litigation. It also spares courts from having to adjudicate unsupported claims with no legal basis.

A. Allowing Plaintiffs To Obtain Class Certification Without Admissible Evidence Undermines The Importance And Significance Of Class Certification

The class certification process is the most important stage in class litigation. The decision has serious and often outcome-determinative effects for all parties involved. There are no longer multiple opportunities for judges to revise or amend their certification decisions. Conditional or provisional class certification was eliminated with the 2003 Rule 23 amendments. Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment. And class decertification decisions are extremely rare.

If the Federal Rules of Evidence do not apply at the class certification stage, plaintiffs could rely solely on hearsay or otherwise objectionable, inadmissible materials, as Respondents did here, knowing very well

that these materials will be insufficient to prove the merits of their claims.

It also would allow plaintiffs to inundate trial courts with a voluminous "evidentiary record" in the hopes that the judge will assume, based on the sheer volume of paper, that the plaintiff satisfied Rule 23's requirements. Assuming the court grants class certification based solely on the volume of records presented, this could have a trickle-up effect on reviewing courts. *See, e.g., Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 733 (D.C. Cir. 2012) (certification motion was decided by court presented with a voluminous record); *Bennett v. Nucor Corp.*, 656 F.3d 802, 816 (8th Cir. 2011) (same).

Even more concerning, if admissible evidence were not required to meet Rule 23's commonality and predominance requirements, plaintiffs would be free to forgo expert analysis of data to show common damages, thus avoiding scrutiny under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This Court has strongly suggested that expert testimony is subject to *Daubert* review; it follows that the admissibility of non-expert evidence also is subject to review. Courts' assessments of expert testimony using *Daubert* standards have become more commonplace, particularly following this Court's decision in *Dukes*. *Dukes*, 564 U.S. at 354 ("the district court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so ....") (citation omitted); *Lamarr-Aruz v. CVS Pharmacy, Inc.*, No. 15-cv-04261 (JGK), 2017 WL 4277188, at *9 (S.D.N.Y. Sept. 26, 2017) ("When a motion to exclude expert testimony is made at the class certification stage, the *Daubert* standard applies, but the inquiry is limited to whether or not the expert reports are admissible to

establish the requirements of Rule 23") (quoting *Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 126 (S.D.N.Y. 2014)); *Center City Periodontists, P.C. v. Dentsply Int'l, Inc.*, ___ F.R.D. ___, 2017 WL 3142119, at *4-9 (E.D. Pa. July 24, 2017).

Having accepted the use of some evidentiary standards at the class certification stage, it seems illogical not to apply the Federal Rules of Evidence to all the materials offered in support of or opposition to class certification. And there is no enumerated exception for class certification proceedings or any reason to treat class certification proceedings differently from other proceedings covered by the Federal Rules of Evidence.

B. If Admissible Evidence Is Not Required To Support Class Certification, Then Employers May Be Forced To Settle Frivolous Claims

By not requiring all evidence presented to support class certification to be admissible, courts have created an incentive for plaintiffs to hide behind a lack of proof to get the class certified, and then pressure the employer to settle. Even in cases where the employer knows the admissible evidence is highly individualized, if the class is certified the employer is forced to make the difficult decision to vigorously defend itself against baseless claims and spend an inordinate amount of money in attorneys' fees, or settle, pay a significant sum, and move on with its business.

In addition, while a party can request immediate appellate review under Fed. R. Civ. P. 23(f), such review generally is only granted in limited circumstances. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702

(2017). *See also In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d at 250 (absent "special circumstances," only three situations warrant immediate review; when the decision to certify is "questionable" and is accompanied by a "death-knell," when the certification decision "presents an unsettled and fundamental issue of law … that is likely to evade end-of-the-case review," and when the decision is "manifestly erroneous"); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 833 (7th Cir. 1999) (same).

As a result, once class certification is achieved, employers are more likely to settle because the ultimate risk of liability at trial is just too great. This is especially true for employment discrimination, ERISA, and wage & hour class actions, as plaintiffs' lawyers can recover awards of attorneys' fees under fee-shifting statutes in these contexts. Finally, as success in litigation often begets copy-cat filings, making it easier to achieve class certification and pressure employers to settle can only prompt more class action filings.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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